

Message Text

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ORIGIN DLOS-09

INFO OCT-01 ARA-06 ISO-00 SSO-00 AF-10 EA-07 EUR-12
NEA-10 FEA-01 NSCE-00 INRE-00 USIE-00 ACDA-07
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L-03 NSAE-00 NSC-05 NSF-01 OES-06 OMB-01 PA-01
PM-04 PRS-01 SP-02 SS-15 /150 R

DRAFTED BY D/LOS:GTAFT:CSA
APPROVED BY D/LOS:FHODSOLL
D/LOS:MR. JAMES
OES/OFA-MR. SCULLY (SUBS)
L-MR. OXMAN

-----120018Z 029290 /75

O 112337Z APR 77 ZFF4
FM SECSTATE WASHDC
TO AMEMBASSY MEXICO NIACT IMMEDIATE

C O N F I D E N T I A L STATE 081154

PLEASE PASS AMB. RICHARDSON/JOHN ZEROLIS

E.O. 11652: GDS

TAGS: PLOS

SUBJ: LOS-HIGH SEAS STATUS OF EEZ
REF: ZEROLIS/TAFT TELCON 4/11
1. THE ISSUE OF THE LEGAL STATUS OF THE EXCLUSIVE ECONOMIC
ZONE (EEZ) AND THE RELATED QUESTIONS OF THE RIGHTS AND
DUTIES OF BOTH THE COASTAL AND OTHER STATES IN THE ZONE
ARE THE MAJOR OUTSTANDING ISSUES IN COMMITTEE II.
2. THE NEGOTIATIONS AT THE SUMMER 1976 SESSION FOCUSED
ON THE KEY ARTICLES 44, 46, AND 75 OF THE RSNT. THE
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PROBLEM IS THE EFFECT OF THE COMBINATION OF THESE. ARTICLE
44, SETTING FORTH A SUMMARY OF COASTAL STATE RIGHTS IS TOO
BROAD, BUT THERE WERE CLEAR INDICATIONS BY KEY DEVELOPING

COASTAL STATES THAT THEY COULD ACCEPT THE EVENSEN FORMULA-
TION OR SOME VARIANT OF SIMILAR LEGAL EFFECT. WITH
RESPECT TO ARTICLE 46, A NUMBER OF AMENDMENTS WERE PUT

FORTH TO STRENGTHEN THE RIGHTS OF OTHER STATES IN THE ZONE, AND CERTAIN LDC COASTAL STATES MADE STATEMENTS INDICATING THEY COULD SUPPORT AMENDMENTS TO ARTICLE 46 WHICH HAD THAT EFFECT. ARTICLE 75 IS THE MOST OFFENSIVE ARTICLE SINCE IT STATES UNEQUIVOCALLY THAT THE ZONE IS NOT RPT NOT HIGH SEAS. THE DEBATES ON THIS ARTICLE WERE TAINTED BY THE INTRODUCTORY NOTE TO THE RSNT IN WHICH

THE CHAIRMAN STATED CLEARLY THAT IN HIS VIEW THE ZONE WAS NEITHER HIGH SEAS NOR TERRITORIAL SEA, BUT A ZONE "SUI GENERIS." HE INDICATED THAT ARTICLE 75 SHOULD NOT BE SUBJECT FOR DEBATE BUT THAT THE ACCOMMODATION SHOULD BE FOUND IN ARTICLES 44 AND 46.

3. AS A MATTER OF LEGAL ANALYSIS, THE ECONOMIC ZONE IS NOT RPT NOT THE EQUIVALENT OF CLASSIC HIGH SEAS, IN THAT IMPORTANT HIGH SEAS FREEDOMS ARE EITHER ELIMINATED OR SIGNIFICANTLY QUALIFIED IN THE ZONE. THE US ITSELF DOES NOT SEEK THE PRESERVATION OF ALL HIGH SEAS FREEDOMS IN THE ZONE (E.G. FISHING). WHEN WE URGE HIGH SEAS STATUS FOR THE ZONE, WHAT WE MEAN IS THAT HIGH SEAS FREEDOMS ARE PRESERVED TO THE EXTENT THAT THEY ARE NOT ELIMINATED OR QUALIFIED BY THE SUBSTANTIVE ECONOMIC ZONE ARTICLES. IN THIS SENSE, THE REGIME OF THE ECONOMIC ZONE CAN BE VIEWED AS "SUI GENERIS" MUCH AS MORE TRADITIONAL CONTIGUOUS ZONE, FISHERIES ZONE, OR CONTINENTAL SHELF REGIMES ARE. HOWEVER, THE PROBLEM IS THAT THE "ZONE" ITSELF IS NOT A "SUI GENERIS" AREA WHICH IS NEITHER HIGH SEAS NOR TERRITORIAL SEA FOR ALL PURPOSES. IT IS RATHER AN

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AREA IN WHICH CHARACTERISTICS OF THE HIGH SEAS ARE PRESERVED FOR CERTAIN PURPOSES AND CO-EXIST WITH BROAD COASTAL STATE RIGHTS REGARDING OFFSHORE RESOURCES AND CERTAIN OTHER SPECIFIED MATTERS. THUS, WE DO NOT RPT NOT SEEK TO DEROGATE FROM COASTAL STATE JURISDICTION BY RETAINING THE HIGH SEAS STATUS OF THE EEZ. THE UNDERLYING THESIS OF THE US PROPOSALS, IS ONE WHICH MAKES CLEAR THAT THE ZONE IS HIGH SEAS FOR SOME PURPOSES BUT IS NOT HIGH SEAS FOR PURPOSES OF THE COASTAL STATE RIGHTS IN THE ZONE.

4. THERE ARE SEVERAL REASONS WHY THE HIGH SEAS STATUS OF THE ZONE OTHER THAN WITH RESPECT TO CERTAIN COASTAL STATE RIGHTS IS IMPORTANT:

-- IN ORDER TO LIMIT THE LIKELY POST-TREATY TREND OF COASTAL STATES TO EXTEND THE SUBSTANTIVE SCOPE OF THEIR RIGHTS IN THE EEZ, AND TRANSFORM THE ZONE OVER TIME INTO THE FUNCTIONAL EQUIVALENT OF A TERRITORIAL SEA.

-- IN ORDER TO LIMIT THE INCENTIVE OF 200-MILE TERRITORIAL SEA CLAIMANTS TO REFUSE TO JOIN A TREATY REGIME, CLAIMING THE TREATY SANCTIONS GENERAL 200-MILE CLAIMS AS A MATTER OF INTERNATIONAL LAW BUT LEAVES IT UP TO

EACH STATE TO DETERMINE THE PRECISE CHARACTER OF ITS ZONE.

-- IN ORDER TO ENSURE THAT THE HIGH SEAS FREEDOMS OF NAVIGATION, OVERFLIGHT, COMMUNICATION, ETC., AS EXERCISED IN THE EEZ ARE THE SAME RIGHTS AS EXERCISED OUTSIDE THE ZONE, E.G., THE RIGHT TO CONDUCT NAVAL MANEUVERS WITHIN THE OUTER LIMITS OF THE EEZ OF OTHER STATES SHOULD BE CLEARLY PRESERVED. IN THIS REGARD, REFERENCES TO THE HIGH SEAS IN OTHER TREATIES DEALING WITH NAVIGATION AND OVERFLIGHT SHOULD CLEARLY AUTOMATICALLY INCLUDE THE ECONOMIC ZONE RATHER THAN FORCING A

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SEPARATE INTERPRETATION OR NEGOTIATION ON THE ISSUE IN EACH CASE.

5. AUSTRALIA PROPOSAL (ARTICLE 75) READS AS FOLLOWS:

THE TERM "HIGH SEAS" AS USED IN THE PRESENT CONVENTION MEANS ALL PARTS OF THE SEA THAT ARE NOT INCLUDED IN THE TERRITORIAL SEA OR IN THE INTERNAL WATERS OF A STATE, OR IN THE ARCHIPELAGIC WATERS OF AN ARCHIPELAGIC STATE, PROVIDED THAT THE EXCLUSIVE ECONOMIC ZONE IS NOT HIGH SEAS WITH RESPECT TO THE EXERCISE OF COASTAL STATE RIGHTS PROVIDED FOR IN THIS CONVENTION.

6. FROM OXMAN AND SMITH: APPARENTLY SOME ARABS AND AFRICANS CONTINUE TO REGARD THE ISSUES OF WHETHER CONTINENTAL SHELF JURISDICTION EXTENDS BEYOND 200 MILES AS A MAJOR OUTSTANDING ISSUE. SINCE THIS MAY BE YOUR MAJOR BARGAINING LEVER IN OTTAWA, YOU MAY WANT TO NOTE THE FACT OF ARAB AND AFRICAN CONCERN WITH THE MEXICANS AS WELL, ALTHOUGH THEIR INTEREST IN THE MATTER IS NOT AS GREAT AS CANADA'S.

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: LAW OF THE SEA, COMMITTEE MEETINGS, PROGRESS REPORTS
Control Number: n/a
Copy: SINGLE
Sent Date: 11-Apr-1977 12:00:00 am
Decaption Date: 01-Jan-1960 12:00:00 am
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1977STATE081154
Document Source: CORE
Document Unique ID: 00
Drafter: GTAFT:CSA
Enclosure: n/a
Executive Order: GS
Errors: N/A
Expiration:
Film Number: D770125-0995
Format: TEL
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1977/newtext/t19770468/aaaachhn.tel
Line Count: 161
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 23ab2fa7-c288-dd11-92da-001cc4696bcc
Office: ORIGIN DLOS
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: n/a
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 22-Dec-2004 12:00:00 am
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 2838722
Secure: OPEN
Status: NATIVE
Subject: LOS-HIGH SEAS STATUS OF EEZ
TAGS: PLOS, MX
To: MEXICO
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/23ab2fa7-c288-dd11-92da-001cc4696bcc
Review Markings:
Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
22 May 2009
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009